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In the Supreme Court of the United States

OCTOBER TERM, 1970

ROBERT ROSENSPAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1717

ROBERT ROSENSPAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1b-8b) is reported at 316 F. Supp. 194. The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 438 F.2d 905.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1971 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on May 17,

1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly held that meals and lodging expenses incurred by petitioner, a traveling salesman who did not maintain any permanent place of abode either at his place of employment or elsewhere, constituted nondeductible "living" expenses within the meaning of Section 262 of the Internal Revenue Code of 1954, rather than deductible "traveling expenses * * * while away from home" within the meaning of Section 162(a).

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 162 [as amended by Sec. 4, Revenue Act of 1962, P.L. 87-834, 76 Stat. 960]. TRADE OR BUSINESS EXPENSES.
>
> (a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * *
>
> (2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business;
>
> * * * *

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

STATEMENT

During the taxable years (1962 and 1964) petitioner was employed as a jewelry salesman on a commission basis. Approximately 300 days a year he traveled by automobile through his extensive sales territory in the Middle West, where he stayed at hotels or motels and ate his meals at restaurants. Five or six times a year he returned to the offices of his employers in New York City, at which he spent several days performing various work-related services such as cleaning up his sample case, checking orders, discussing customers' credit, recommending changes in stock, and attending staff meetings. (Pet. App. 2a-3a.)

Petitioner used the home of his brother in Brooklyn as a personal residential address for purposes of voting and filing income tax returns, and kept some of his personal possessions there. Although he stayed occasionally with his brother on his infrequent trips to New York, petitioner stayed more often at a nearby motel. Petitioner does not contend that he had a permanent abode or residence in Brooklyn or anywhere else. (Pet. App. 3a.)

In his income tax returns for the taxable years, petitioner claimed deductions for the cost of meals and lodging incurred while traveling through his

assigned sales territory. The Commissioner disallowed the deductions and the district court sustained his determination. (Pet. App. 1b-8b.) The court of appeals affirmed (Pet. App. 1a-15a).

ARGUMENT

The decision below, affirming that of the district court, is correct and in accord with decisions of this and other courts. There is no conflict or other reason for further review.

1. In holding that petitioner, a traveling salesman who concededly did not maintain any permanent place of abode anywhere,[1] was not entitled to deduct his food and lodging expenses incurred in hotels while traveling in his sales territory, the courts below reached the only result consistent with the statutory scheme, the administrative interpretation, and the relevant decisions. Section 262 of the Internal Revenue Code of 1954, *supra*, p. 3, prohibits the deduction of "personal, living, or family expenses." Section 162 (a), *supra*, p. 2, carves out a limited exception to this general rule; it authorizes the deduction of amounts expended for "meals and lodging" while the taxpayer is traveling "away from home." As the court below pointed out (Pet. App. 4a-6a, 14a-15a), this exception was designed to afford tax relief to a taxpayer who maintains a permanent place of abode ("home") at his principal place of business and neces-

[1] As the court below noted (Pet. App. 3a), petitioner "does not contend that he had a permanent abode or residence in Brooklyn or anywhere else." Nor does he make any such contention here.

sarily incurs duplicate living expenses for meals and lodging while traveling away from that place on business.[2] The exception must of course be narrowly construed, since it grants a deduction for living expenses which other taxpayers must bear without benefit of any deduction. See *United States* v. *Correll*, 389 U.S. 299, 301-302, 304-306.[3] It does not extend to a taxpayer-employee who, like petitioner here, does not maintain any fixed dwelling place, either at his principal place of employment or elsewhere, and thus incurs no duplicate expenses for meals and lodging. *James* v. *United States*, 308 F. 2d 204 (C.A. 9).

In harmony with the legislative intent, this Court has held that an employee is not entitled to deduct

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[2] In the original regulation in this area, traveling expenses, including meals and lodging, were deductible only "in an amount in excess of any expenditures ordinarily required for such purposes when at home." T.D. 3101, 3 Cum. Bull. 191, amending Article 292 of Regulations 45 (1918 Revenue Act). But since this rule proved extremely difficult to administer, Congress enacted Section 214(a)(1) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 239 (predecessor to Section 162(a)(2)), which allowed deduction of the entire amount expended for meals and lodging while away from home in the pursuit of a trade or business. See *United States* v. *Correll*, 389 U.S. 299, 301 n. 6.

[3] In the words of this Court in *Correll* (389 U.S. at 301-302), "even the taxpayer who incurs substantial hotel and restaurant expenses because of the special demands of business travel receives something of a windfall, for at least part of what he spends on meals represents a personal living expense that other taxpayers must bear without receiving any deduction at all. Not surprisingly, therefore, Congress did not extend the special benefits of § 162(a)(2) to every conceivable situation involving business travel. It made the total cost of meals and lodging deductible only if incurred in the course of travel that takes the taxpayer 'away from home.'"

meals and lodging expenses incurred while living at his post of duty, even though he keeps an established residence at another place at which he incurs duplicate living expenses. *Commissioner* v. *Flowers*, 326 U.S. 465.[4] See also *Commissioner* v. *Stidger*, 386 U.S. 287; *Peurifoy* v. *Commissioner*, 358 U.S. 59; *United States* v. *Correll*, *supra*; *Barnhill* v. *Commissioner*, 148 F. 2d 913 (C.A. 4). *A fortiori*, an employee is not entitled to deduct such living expenses where, as here, he is an itinerant salesman who maintains *no* permanent living quarters—either in his assigned sales territory, or in any other place. In such case, the employee in effect makes his home wherever he hangs his hat and accordingly has no statutory "home" from which he can be "away." *James* v. *United States*, *supra*; *Scotten* v. *Commissioner*, 391 F. 2d 274 (C.A. 5); *Fisher* v. *Commissioner*, 230 F. 2d 79 (C.A. 7); *United States* v. *Mathews*, 332 F. 2d 91 (C.A. 9); *Hicks* v. *Commissioner*, 47 T.C. 71; *Deneke* v. *Commissioner*, 42 T.C. 981. See also I. T. 1490, I-2 Cum. Bull. 89; G.C.M. 23672, 1943 Cum. Bull. 66; Rev. Rul. 71-247, 1971-23 I.R.B. 8.

To subscribe to petitioner's position would produce the incongruous result that an itinerant employee who has no established "home" is entitled to deduct all of

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[4] A settled corollary of this rule is that commuting expenses, *i.e.*, ordinary and necessary expenses of traveling between the taxpayer's home and principal place of business or employment, are nondeductible personal expenses under Section 262, not deductible traveling expenses "away from home" under Section 162(a). *Sanders* v. *Commissioner*, 439 F. 2d 296 (C.A. 9), petition for a writ of certiorari pending, No. 1727, this Term.

his food and lodging expenses, while a stationary employee who maintains a "home" at his post of duty is barred from deducting any similar living expenses. Indeed, it would impute to Congress an intention to confer upon traveling salesmen who maintain no regular dwelling place, and thus incur no duplicate expenses for meals and lodging, a tax benefit not enjoyed by other taxpayers who must pay such living expenses out of after-tax income. Nothing in the statute, its history, the administrative rulings or the decisions warrants the view that Congress intended to accord such preferential tax treatment to "homeless" traveling salesmen.

2. The decision below is correct irrespective of whether in the context of this case "home" as used in Section 162(a) is construed to mean the taxpayer's living quarters at his business headquarters, as petitioner contends (Pet. 2, 6-8), or some permanent place of abode, as the court below held (Pet. App. 14a-15a). Petitioner cannot prevail under either test, for the simple reason that he did not maintain a "home" in either sense. His only living quarters consisted of hotels and motels at which he stopped while traveling through his Middle West sales territory and on his occasional visits to his employers' place of business (Pet. App. 2a-3a). In short, as the court below held, a traveling salesman who does not maintain *any* established place of abode, and lives only where his employment duties take him, does not incur the duplicate living expenses Congress had in mind in allowing a deduction for meals and lodging while traveling "away from home."

Moreover, petitioner's contention that the meals and lodging expenses in question were incurred "away from home" rests upon his self-serving premise (Pet. 4, 6-7) that his employers' "business headquarters" in New York must be deemed his "home" for tax purposes. This premise in turn rests upon a combination of two factual assumptions, neither of them supported by the record: (1) that petitioner's principal place of employment coincided with his employer's business headquarters, and (2) that he maintained permanent living quarters (a "home") at his employers' business headquarters, from which he was "away" while he incurred the meals and lodging expenses in question. The undisputed evidentiary facts show that petitioner devoted the bulk of his time and efforts in pursuit of his employment as a traveling salesman in his Middle West sales territory, performing only incidental services at his employers' place of business in New York; and that he had no permanent place of abode anywhere, not even in his sales territory (Pet. App. 2a-3a, 15a).[5]

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[5] To be sure, the government conceded in its district court brief (pp. 7-8) that petitioner's principal place of employment was his employers' business headquarters in New York. However, the critical and undisputed fact remains that petitioner had no permanent place of abode there or elsewhere (Pet. App. 3a). The court below aptly observed that (Pet. App. 15a):

> We fail to see how Rosenspan's occasional trips to New York City, assuming for the sake of argument that his "business headquarters" was in New York rather than in his sales territory, differentiate him economically from the homeless traveling salesman without even the modicum of a business headquarters Rosenspan is claimed to have possessed. * * *

3. Far from creating a conflict, as petitioner asserts (Pet. 6-7), the decision below is in complete accord with other decisions disallowing claimed deductions for food and lodging expenses by "homeless" traveling salesmen. *James* v. *United States, supra*; *Scotten* v. *Commissioner, supra*; *Fisher* v. *Commissioner, supra*; *United States* v. *Mathews, supra*. The cases upon which petitioner relies for conflict in no way aid his cause. They stand for the proposition that a taxpayer who maintains living quarters *both* in the vicinity of his principal place of employment and elsewhere is not "away from home" while living at his place of employment, and that consequently his expenses for meals and lodging at that place are not deductible.[6] They manifestly furnish no authority

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[6] Thus in *Wills* v. *Commissioner*, 411 F. 2d 537 (C.A. 9); *Coerver* v. *Commissioner*, 297 F. 2d 837 (C.A. 3), affirming *per curiam*, 36 T.C. 252; and *Martin* v. *Commissioner*, 295 F. 2d 38 (C.A. 3), affirming *per curiam*, 19 T.C.M. 1216, it was held that the taxpayer-employee's tax "home" was his dwelling place in the vicinity of his principal place of employment, not his residence elsewhere. See *Commissioner* v. *Flowers*, 326 U.S. 465. *Bercaw* v. *Commissioner*, 165 F. 2d 521 (C.A. 4), involved a similar situation and holding with respect to a military employee. See *Commissioner* v. *Stidger*, 386 U.S. 287. In *Commissioner* v. *Mooneyhan*, 404 F .2d 522 (C.A. 6), it was held that the taxpayer's living expenses at a new place of employment were not deductible because the period of his employment at that place was indefinite rather than temporary. See *Peurifoy* v. *Commissioner*, 358 U.S. 59. In *Cockrell* v. *Commissioner*, 321 F. 2d 504 (C.A. 8), and *England* v. *United States*, 345 F. 2d 414 (C.A. 7), it was held that expenses of moving from one principal place of work to another (now covered by Code Section 217) were not deductible.

for allowing a deduction for such living expenses where, as here, the taxpayer is in a continuous travel status and has *no* fixed living quarters—either at his principal place of employment or elsewhere. Indeed, to the extent that the cases cited by petitioner are deemed applicable to a traveling salesman who, like petitioner, had no "home" at all, their rationale demands the same result as that reached by the courts below in this case.

4. Contrary to petitioner's assertion (Pet. 9-10), the instant case does not present an issue of general importance. Rather it involves the unusual situation of an itinerant taxpayer who has no permanent place of abode anywhere, and hence does not incur duplicate living expenses for meals and lodging "away from home." The census count for "salesmen" to which petitioner refers in an effort to show importance (Pet. 9 & n. 5) does not reflect what portion represents "traveling" salesmen, to say nothing of what lesser portion represents "homeless" traveling salesmen. In view of the paucity of litigation involving taxpayers within that category, it is fair to assume that the fraction is minuscule. In any event, suffice it to note that in the comparatively few cases involving the narrow issue presented here the courts have uniformly rejected petitioner's position.[7]

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[7] There is no more basis for petitioner's suggestion (Pet. 9) that the decision below is inconsistent with general instructions in the income tax return form than for his assertion of conflict with other decisions. The instructions plainly follow the judicially established rules governing deductibility of meals and lodging expenses while traveling away from

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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home. That they do not deal specifically with "homeless" traveling salesmen does not, as petitioner implies, mean that such taxpayers are entitled to deduct their meals and lodging expenses, but rather emphasizes the unusual factual nature of the instant case.

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